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No. 1005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WADE McNEIL,

Petitioner

v.

STEWART UDALL, individually, and as Secretary of the Interior,

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LEIF ERICKSON
347 North Last Chance Gulch
Helena, Montana

ELLIS LYONS
Tower Building
Fourteenth and K Streets
Washington, D. C.

ATTORNEYS FOR PETITIONER.

STATE PUBLISHING CO., HELENA, MONT.

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WADE McNEIL,

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v.

STEWART UDALL, individually, and as Secretary of the Interior,

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

1. Wade McNeil, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on December 24, 1964.

(a) The opinion of the Court of Appeals has not been reported. It is reproduced in the Appendix. The same question considered by the Court of Appeals in the opinion of December 24, 1964, was considered in the case of McNeil v. Seaton, reported in 108 U. S. App. D.C. 296, 281 Fed. 2d 931, and a copy of the opinion in that case is also included in the Appendix to this Petition.

(b) The judgment sought to be reviewed was dated and entered December 24, 1964. This Court has jurisdiction to grant the writ under the Act of June 25, 1948, c.636, 62 Stat. 928, 28 U.S.C.A., Sec. 1254.

(c) The first question presented for review is whether petitioner's preference in the granting of grazing privileges

in Montana Grazing District No. 1, which he enjoys under the Taylor Grazing Act, Title 43, U.S.C. Sec. 315, may by administrative action of the defendant and his subordinates be destroyed, impaired or diminished.

The second question is whether the decision of the Court of Appeals, dated December 24, 1964, in the instant case, is in such conflict with the opinion of the same Court in *Wade McNeil v. Fred A. Seaton,* 108 U.S.App. D.C.296, 281 Fed. 2d 931, and whether the opinion is in such conflict also with what the same Court held in *Red Canyon Sheep Company v. Ickes,* 69 App. D.C. 27, 98 Fed. 2d 308, 312, so that uncertainty exists as to the proper administration of the vast areas of public lands under the jurisdiction of defendant.

The third question presented is whether petitioner, who expended money, time, and effort in the improvement of the carrying capacity of his base property in reliance upon his preferred position as a priority user during the five-year period immediately preceding June 28, 1934, as fixed by the Range Code, 43 C.F.R. 161.2 (k) (1), may by subsequent action of the defendant be deprived of grazing privileges to which he would have been entitled under the priority period, 1929-1934.

(d) This case involves the following statutes and regulations.

The Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C.A., Sec. 315-315r, enacted on June 28, 1934, and, particularly, the following language from Sec. 315b,

> "Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide

occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use."

43 C.F.R. 161.2 (b)

"Preference in the granting of grazing privileges will be given to those applicants within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them. When the demands of all such preference applicants cannot be satisfied, prior consideration will be given applicants in the manner specified in Section 161.6. Provision will be made for other applicants so far as Federal range remains available.

43 C.F.R. 161.2 (k) (1),

"'Land dependent by use' means forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 'priority period', was used as a part of an established, permanent, continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. The priority period shall be the five-year period immediately preceding June 28, 1934, . . ."

43 C.F.R. 161.2 (k) (2),

"No land shall be considered as dependent by use unless offered as base property in an application for a grazing license or permit within one year after the date when the Federal range used in creating the dependency by use first became a part of a grazing district, except that if the Federal range used in creating the dependency by use became a part of a grazing district prior to June 28, 1935, such base property shall not be considered as dependent by use unless offered in an application for a grazing license or permit filed prior to said date.

As applied to the lands described below, the provisions of Sec. 161.2 (k) of the Federal Range Code (43CFR 161.2 (k), are modified to read as follows:

'Land dependent by use' means forage land other than Federal range of such character that the conduct of an economic livestock operations requires the use of some part of the Federal range described below in connection with it and which in the 'priority period' was used as a part of an established, permanent, and continuing livestock operation during each year of such priority period in connection with such Federal range.

(ii) The priority period shall be the five-year period immediately preceding January 1, 1953."

(e) Prior to June 28, 1934, the United States was the owner of vast areas of lands in the West making up the open range. The use of these lands was not being regulated. They were being overgrazed and subject to erosion and other destructive forces. The Taylor Grazing Act was adopted "in order to promote the highest use of the public lands pending its final disposal". The secretary of the Interior was given jurisdiction of the lands and was authorized to issue grazing permits and, generally, to carry out the purposes of the Act.

On June 28, 1934, the effective date of the Act, and for many years prior thereto, petitioner was a landowner en-

gaged in the livestock business and depending on the use of the public lands for summer grazing in the area which afterwards became Montana Grazing District No. 1 within the purview of the Act. He made application for grazing privileges, as provided in the Act and the Court of Appeals for the District of Columbia Circuit, in the opinions appended, recognized that petitioner is and has been since the establishment of Montana Grazing District No. 1, a permittee preferred in the granting of grazing privileges to those who are not similarly situated.

Montana Grazing District No. 1 was created in 1935. Thereafter, on April 9, 1936, the then Secretary entered into a cooperative agreement under which the actual issuances of grazing permits each year was by the South Phillips Cooperative State Grazing District. The Joint Appendix used in the Court of Appeals contains testimony that petitioner had developed the base carrying capacity of the land he owned prior to 1935 (base carrying capacity being the number of animal units property owned or controlled by a permittee will provide forage for livestock in the four months winter non-grazing season on land owned or controlled by the petitioner) to 407 animal units (J. A. 70, 52, plaintiff's Exhibit No. 1, page 354). It is petitioner's testimony that he improved the winter carrying capacity of his base in reliance on statements of representatives of the Bureau of Land Management, the administrative agency through which the Secretary acts, that he would be given grazing permits to the full extent of the developed capacity of his original base property (J. A. 48,

49, 50, 52, 54, 55). His wife testified to the same effect (J. A. 67, 68, 69, 70).

While Montana Grazing District No. 1 was being administered by the cooperative grazing district, grazing permits were issued to three competing users who either did not own property adjacent to the district prior to June, 1934, or, in one case, failed to apply for grazing permits within the time fixed by the Range Code (plaintiff's Exhibit No. 5; plaintiff's Exhibit No. 7, J.A. 42-49). The opinions appended and the memorandum opinion of Judge Tamm of the District Court (J. A. 22) recognize that none of the three competing users qualified for preference based upon ownership and use of the public range prior to the effective date of the Taylor Grazing Act. As a result of the issuance of licenses to these nonqualified users, petitioner was at no time granted grazing privileges to the full extent of the carrying capacity of his developed base property.

The record before this Court shows that petitioner has for more than twenty years been involved in various administrative and court-review proceedings in his attempt to secure the grazing privileges to which he is entitled under the Taylor Grazing Act. During the course of one of his appeals to the Secretary of the Interior, without notice or hearing, the Special Rule appearing at Page Three of this Petition, was adopted for Montana Grazing District No. 1. The rule changed the priority period for determination of privileges from that found in the Original Range Code, 1929-1934, to the period 1948-1953, 43 C.F.R. 161.2 (k) 2 (ii).

What the new rule did was determine preference rights on the actual use made of the Federal range during the

1948-1953 period whether that use was lawful under the Act and the then regulations of the Secretary or not. Thus the unlawful use by the competing nonpreference users was made the basis for giving them preference standing which they did not have at the time they were using the range in the 1948-1953 period.

On the other hand, petitioner's rights were made to depend, upon the adoption of the new rule, not on his preference rights under the Act and the then regulations of the Secretary but upon his actual use of the public range during the same period. During that period petitioner was being unlawfully denied the right to use the range to the full extent of his preference, by action of the cooperative and the representatives of the then Secretary. He was entitled to a minimum of 407 animal units based upon the carrying capacity of the base property he owned before 1935 and additional permits for the carrying capacity of base property he acquired after 1935. Instead, he was allowed to graze only 282 head of cattle and his rights under the Special Rule were measured on that number of animal units. Since the range was overstocked, the number of permits issued to petitioner and the competing nonpreference users after 1953 were reduced, but each of the nonpreference users was granted more preference grazing rights than was petitioner.

The Court observed, in the opinion in McNeil v. Seaton, Note 23,

> "The brief (of the Government) does not explain how permits issued by the cooperative during a period of mismanagement became criteria with respect to the issuance of permits for the year 1953 and succeeding years."

The Court of Appeals, in its opinion in the case of Wade McNeil v. Fred A. Seaton, 108 U. S. App. D. C. 296, 281 Fed. 2d 931, summed up the effect of the Special Rule in this language,

> "It is enough for our purpose to note that the status of this appellant as a preference applicant, was no longer that which had been accorded to him by the Act and the Range Code prior to the Special Rule. Moreover, newcomers to livestock operations in the area during the amended priority period 1948-1952, were to be given grazing privileges as to base lands 'dependent by use' to the extent that they had been licensed during 'such priority period' under the administration of the State Cooperatives."

The Court refused to strike down the Special Rule, but the Court then said,

> "To the extent that the Special Rule is repugnant to the Act and to the Range Code prior to 1956, if and as applied to this appellant (petitioner McNeil) to deprive him of his rights and to award others grazing privileges in derogation of appellant's preference status, it is void. We expect that if appellant should again apply for a grazing permit, his application will be processed in a manner not inconsistent with this opinion, but otherwise within the provisions of the Range Code."

After the remand to the District Court and the entry of judgment for petitioner, petitioner made application for grazing privileges for 1961 for 439 animal units, the full developed capacity of all of his base property. The defendant, acting through the Bureau of Land Management, granted petitioner the same number of animal units that he had under the Special Rule, that is, 232 animal units, and denied his application for the balance of the animal units applied for by him. At the same time the non-preference competing users, whose operations were not established

until after petitioner's base property was fully developed, were awarded a total of 1284 animal units. The competing user Lock was granted 427 animal units, Matovich Brothers, 601 animal units, and Wiederrick, 256 animal units. Thus petitioner who under the Act qualified for preference in the granting of grazing permits was awarded the least number of permits of the four competing users.

Thereafter, petitioner brought the action, Wade McNeil v. Stewart Udall, individually, and as Secretary of the Interior, Civil 678-62, in the United States District Court for the District of Columbia. The Complaint appears in the Joint Appendix at Page Two. Briefly, it sought a declaration that under the judgment in McNeil v. Seation, supra, petitioner was entitled to grazing privileges in Montana Grazing District No. 1 to the full extent of the developed carrying capacity of his base property. After trial, the Court issued its memorandum opinion (J. A. 22), made its findings of fact and conclusions of law (J. A. 29), and entered judgment in favor of the defendant (J. A. 35). From that judgment petitioner appealed to United States Court of Appeals for the District of Columbia Circuit, that appeal resulting in the decision of which review is sought. The judgment of the District Court was affirmed.

(f) The United States District Court had jurisdiction of the cause since the action arose under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C., Sec. 315-315r (1958), a law of the United States. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

(g) Petitioner believes this writ should issue because,

as a result of the opinions of the Court of Appeals for the District of Columbia Circuit, being the decision in *Red Canyon Sheep Company v. Ickes,* 69 App. D.C. 27, 98 Feb. 2d 308 (1938), hereafter referred to as Red Canyon Sheep, *Wade McNeil v. Fred A. Seaton, individually, and as Secretary of the Interior,* 108 U.S. App. D.C. 296, 281 Fed. 2d 931, hereafter referred to as McNeil v. Seaton, and the decision of which review is sought, Wade McNeil v. Stewart Udall, individually, and as Secretary of the Interior, those charged with the administration of the public lands of the West and those permittees who come within the purview of the Taylor Grazing Act will not know what the rights of individual permittees will be or how they are to be measured.

The decision in McNeil v. Udall reaches a result directly contrary to what the Court held in the Red Canyon Sheep and McNeil v. Seaton opinions, but at the same time, the Court specifically approves the latter decision. As pointed out in the quotation above from the decision in McNeil v. Seaton, petitioner was entitled to the same privileges as he had prior to the adoption of the Special Rule. It is undisputed that at the time the newcomers arrived on the scene, petitioner's base property that he owned prior to 1934 had a winter carrying capacity of 407 animal units. Other after-acquired base property to which the priority rights did not attach brought the base carrying capacity to 439 animal units (J.A. 52, 70; plaintiff's Exhibit No. 1, page 354).

As quoted above, the Court, in McNeil v. Seaton, said,

> "To the extent that the Special Rule is repugnant to the Act and the Range Code prior to 1956, if and as applied to this appellant to deprive him of his rights and to award others grazing privileges in derogation of appellant's preference status, it is void."

If the Act and the 1929-1934 priority period were applied, petitioner would be entitled to grazing permits for 407 head of cattle, his pre-1934 base having a winter carrying capacity of 407 animal units before the appearance of the newcomers.

We submit that under the opinion in McNeil v. Seaton, petitioner was entitled to grazing permits to the extent of 407 animal units and the judgment in McNeil v. Udall is in direct conflict with that holding since the judgment approves a reduction in grazing permits from the 407, to which petitioner would be entitled to under McNeil v. Seaton, to 232. This conflict cannot be reconciled by a reading of the opinions and because of the importance of this matter, this Court should issue the writ to determine which of the holdings is correct.

Further, the writ should be granted because the opinion of which review is sought takes from petitioner statutory rights granted to him by the Taylor Grazing Act.

The Taylor Grazing Act, Sec. 315b, among other things, provides,

> " . . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of

> the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan . . . "

As was held in McNeil v. Seaton, petitioner came within the preference class established by the quoted language of the Act. None of the competing users granted grazing privileges in derogation of petitioner's rights qualified for preference under the Act itself.

The Court of Appeals of the District of Columbia Circuit in Red Canyon Sheep, after citing a number of cases dealing with the power of equity to protect grazing privileges through injunctive relief under State and Federal enactments said,

> "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have *their source in an enactment of the Congress.*" (emphasis supplied)

This language was cited with approval by the same Court in McNeil v. Seaton. The Court, in the latter case, makes reference to the additional language found in the opinion in Red Canyon Sheep,

> "But we do conclude that if the Secretary determines to set up a grazing district including lands upon which grazing has been going on, *then those who have been grazing their livestock upon these lands* and who bring themselves within a preferred class set up by the statute and regulations, are entitled as a right to permits as against others who do not possess the same facilities for economic and beneficial use of the range." (emphasis supplied)

The Court further says, in Red Canyon Sheep,

> "The purpose of the Act (the Taylor Grazing Act) seems to be at least two-fold. First, it is designed to provide for the most beneficial use possible of the public

> range in interest of grazers themselves but also of the public at large. The livestock industry of the West is an important food supply for the people of the nation. In the arid regions of the West, commercial success in the livestock industry requires that sheep and cattle be run upon the open range. This is a matter of common knowledge. Second, *the Act is intended in the interest of the stockgrowers themselves to define their grazing rights and to protect those rights by regulation against interference.*" (emphasis supplied)

The quoted language of the Taylor Grazing Act appearing last above shows that it applies to those persons who are in the livestock business adjacent to a district, afterwards created, prior to the time of the enactment of the Act itself. This is the view taken by the Court in the Red Canyon Sheep case as appears from the language emphasized by the petitioner in the quotation first appearing in this petition from the opinion in that case. The right being statutory and the petitioner having qualified for the preference right prior to the granting of any grazing privileges to the newcomers who could not qualify, the respondent may not by Special Rule, as held by the Court in McNeil v. Seaton, diminish or destroy petitioner's rights to grazing privileges in Montana Grazing District No. 1.

The principle is set out in the following language in the opinion in McNeil v. Seaton,

> "We say this much: this appellant further was entitled to 'preference' under the Act and the Range Code as we have shown. The word in the context here used is to be taken in its ordinary sense. Its meaning is plain. It is a term with which Congress is fully familiar as in legislation dealing with immigration, preference in employment, Indian land allotments, and many other fields.
>
> So here. 'Preference shall be given' to those, like appellant, who come within the Act. This appellant not

> only was engaged in stockraising when the Act was passed but he qualified under the Range Code as and when first promulgated. He was entitled to rely upon the *preference Congress had given him*: to use the public range as dedicated to a special purpose in aid of Congressional policy. We deem his rights—whatever their exact nature—to have been 'protected against tortious invasion' and to have been *'founded on a statute which confers a privilege'. Accordingly this appellant was entitled to invest his time, effort and capital and to develop his stock raising business, all subject, of course, to similar preferences to be accorded in the affected areas to others comparably situated.* We see no basis upon which by special rule adopted more than twenty years after appellant had embarked upon his venture he may lawfully be deprived of his *statutory privilege.*" (emphasis supplied)

A reading of the opinion in McNeil v. Seaton and a consideration of the record shows that without the Special Rule changing the priority periods, petitioner would be entitled to a minimum of 407 animal units grazing privileges, that being the carrying capacity of his developed base property on the lands owned by him as a base prior to the enactment of the Taylor Grazing Act.

The Taylor Grazing Act, by its own language, determines the extent of the grazing privileges to be granted to any preference applicant in the following language from Sec. 315b,

> "Preference shall be given in the issuance of grazing privileges to those (who qualify for preference status) as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them, . . ."

By the time the competing nonpreference users were improperly granted grazing privileges by the cooperative grazing district, grazing permits for 407 animal units were

required by petitioner "to permit the proper use of lands—owned, occupied or leased by" him.

Thus, not only is the preference status petitioner enjoys provided by the Act, but so also does the Act define the extent of the grazing privileges to be afforded him under that preference. This latter, of course, is based on the assumption that there is grazing available in the District to care for all of those preference users who fall in the class to which petitioner belongs. The record here shows that without the grant of grazing privileges to nonpreference applicants, there is ample grazing to supply the demands of the petitioner and other preference applicants similarly situated (J. A. 7).

Respondent has maintained that the preference extends only to the extent of the number of head wintered on the base property during the 1929-1934 priority period. With that view the judges sitting in the case of McNeil v. Udall agreed (App.1). In adopting this view the members of the Court made no attempt to reconcile their conclusion with the language of the Court in McNeil v. Seaton to the effect that petitioner "was entitled to invest his time, effort and capital and to develop his stockraising business" in reliance on his right to secure grazing privileges based upon his need for them to permit the proper use of the lands owned by him. Obviously, there would be no point in increasing the carrying capacity of his base for wintering cattle if he were not going to get additional summer range for their use during the summer season.

Nor has the Court in McNeil v. Udall considered or discussed the language in McNeil v. Seaton holding the peti-

tioner's right to be statutory and that there is "no basis upon which by Special Rule adopted more than twenty years after appellant had embarked upon his venture he may lawfully be deprived of his statutory privilege."

As pointed out in Note 19 to the opinion in McNeil v. Seaton, by 1941, 142 million acres located in ten Western states were being administered under the Taylor Grazing Act. By that time some 20,000 permits had been issued.

We respectfully submit that the holding in McNeil v. Udall cannot be reconciled with what the Court held in McNeil v. Seaton and in view of the fact that the Court in McNeil v. Udall has made no effort to harmonize its holding with what the Court held in McNeil v. Seaton, serious questions affecting the public, the Department of the Interior and the stockmen of the West are raised which must ultimately be resolved.

Because of the conflict between the opinions with the resulting doubt as to the proper administration of the public lands under the Taylor Grazing Act and because the judgment in McNeil v. Seaton raises important questions as to the extent of the power of an administrative agency to reduce or deny rights granted by statute and because of the manifest injustice resulting to the petitioner under the judgment in McNeil v. Udall, petitioner respectfully urges that this petition be granted.

LEIF ERICKSON
347 North Last Chance Gulch
Helena, Montana

ELLIS LYONS
Tower Building
Fourteenth and K Streets
Washington, D. C.
Attorneys for Petitioner.

APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,490

WADE MCNEIL, APPELLANT

v.

STEWART UDALL, Individually and as Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided December 24, 1964

Mr. Leif Erickson, of the bar of the Supreme Court of Montana, *pro hac vice*, by special leave of court, with whom *Mr. Ellis Lyons* was on the brief, for appellant.

Mr. Thomas L. McKevitt, Attorney, Department of Justice, with whom *Assistant Attorney General Clark* and *Mr. S. Billingsley Hill*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Roger P. Marquis*, Attorney, Department of Justice, also entered an appearance for appellee.

Before FAHY, WASHINGTON and WRIGHT, *Circuit Judges*.

PER CURIAM: The background of this controversy over

grazing rights under the Taylor Grazing Act[1] is detailed in *McNeil* v. *Seaton*, 108 U.S.App.D.C. 296, 281 F.2d 931 (1960). We there held that the Special Rule[2] promulgated by the Secretary, which changed the preference reference period fixed in the Range Code for use of public grazing lands by local land owners from 1929-34 to 1947-52, could not be applied to deprive appellant of his preference based on the prior reference period.

In considering appellant's application for the grazing permit in suit here, the Secretary found that appellant was entitled to 143 AU's[3] based on his 1929-34 ownership and use, and 89 AU's based on his ownership of other land in the area not used for grazing during the priority period. Appellant attacks the Secretary's action as unresponsive to our holding in *McNeil* v. *Seaton, supra,* on the ground that it makes no allowance for the increased productivity of his 1929-34 land or for the additional land acquired by him. We conclude that the Secretary's action complies with the requirement of *McNeil* v. *Seaton.*

Appellant is entitled to a preference based on the productivity of his land and his use of the federal range during the 1929-34 preference period. All we held in *McNeil* v. *Seaton* was that the Secretary could not diminish appellant's preference based on his 1929-34 use. As the District Court's memorandum opinion and findings demonstrate, the Secretary, in issuing appellant's grazing per-

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[1] 48 STAT. 1269, as amended 49 STAT. 1976, 68 STAT. 151, 43 U.S.C. §§ 315-315r.

[2] Pursuant to statutory authority, the Secretary adopted implementing regulations, the so-called Range Code now appearing at 43 C.F.R. (1964 Rev.) Part 161. The Special Rule which changed the reference period in the regulations is also part of the Range Code. 43 C.F.R. (1958 Supp.) § 161.2(k) (3) (iii).

[3] An AU is an animal unit. During the 1929-34 period appellant grazed an average of 143 cattle on his land.

mit, has not only respected his 1929-34 rights, but has also awarded him additional preference rights covering land acquired in the area since that time.[4]

Affirmed.

[4] We note that under the Special Rule appellant is entitled to 232 AU's—all Class I rights. Application of the Special Rule to appellant, therefore, would not violate this court's directions in *McNeil* v. *Seaton*, since appellant would receive more than the 143 AU's to which he is entitled by reason of his 1929-34 use. We do not pass on whether the Secretary's placing of 89 rights in Class II is proper, since this question was not raised by the parties.

APPENDIX 2

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15351

WADE MCNEIL, APPELLANT

v.

FRED A. SEATON, individually and as Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided June 16, 1960

Mr. Leif Erickson, of the bar of the Supreme Court of Montana, *pro hac vice,* by special leave of court, with whom *Mr. Ellis Lyons* was on the brief, for appellant.

Mr. Hugh Nugent, Attorney, Department of Justice, of the bar of the Supreme Court of Missouri, *pro hac vice,* by special leave of court, with whom *Mr. Roger P. Marquis,* Attorney, Department of Justice, was on the brief, for appellee. *Mr. Claron C. Spencer,* Attorney, Department of Justice, also entered an appearance for appellee.

Before MR. JUSTICE BURTON, retired,* and WILBUR K. MILLER and DANAHER, *Circuit Judges.*

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* Sitting by designation pursuant to 28 U.S.C. § 294(a).

DANAHER, *Circuit Judge*: This case involves appellant's claim that he has wrongfully been denied rights accruing to him under the Taylor Grazing Act[1] and the Federal Range Code.[2] The Secretary on June 19, 1956 promulgated a Special Rule[3] the effect of which was to reduce appellant's claimed preferential grazing privileges on the federal range and to permit grazing by other users allegedly not entitled to grazing preferences. Cross motions for summary judgment were considered by the District Court where judgment was entered for the Secretary and appellant's complaint was dismissed. Basically this appeal presents only an issue as to the validity of the Special Rule.

The Secretary's motion in the District Court, in part, asked judgment on the ground that "The United States, a sovereign not amenable to suit, is an indispensable party defendant." The point was not pressed as the District Judge noted, and properly, we think.[4] Here the Secretary was named and appeared,[5] and we have held that rights acquired under the Taylor Grazing Act may

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[1] Act of June 28, 1934, 48 STAT. 1269, 43 U.S.C. §§ 315-315r (1958).

[2] 19 FED. REG. 8954 (1954) (now appearing as amended in 43 C.F.R. §§ 161.1-.19 (Supp. 1959)).

[3] 21 FED. REG. 4292 (1956) 43 C.F.R. § 161.2(k) (3) (iii) (Supp. 1959). And see 43 C.F.R. § 161.16 (Supp. 1959).

[4] Cf. Brooks v. Dewar, 313 U.S. 354, 359, 360 (1941); West Coast Exploration Co. v. McKay, 93 U.S.App.D.C. 307, 213 F.2d 582, *cert. denied*, 347 U.S. 989 (1954).

[5] That the *Secretary* has been regarded as the "indispensable party," see Richman v. Beck, 257 F.2d 575, 579 (10 Cir. 1958); Sellas v. Kirk, 200 F.2d 217 (9 Cir. 1952), *cert. denied*, 345 U.S. 940 (1953); Bedke v. Quinn, 154 F. Supp. 370 (D. Idaho 1957).

be protected against unlawful action by the Secretary.[6] We think the case is properly here.

The Secretary established Montana Grazing District No. 1 on July 11, 1935, as by section 1 of the Act he was authorized to do after notice and hearing.[7] He issued the Federal Range Code pursuant to section 2 of the Act which "seeks to provide the most beneficial use of the public range and *to protect grazing rights* in the districts it creates. *Chournos* v. *United States*, 193 F.2d 321."[8] (Emphasis added.) The Act in section 3 provided that the Secretary is authorized to issue grazing permits "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range . . . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them . . . ."[9] This appellant qualified for the "preference" specified in the Act, for he had been continuously engaged in the livestock business in the area in question since 1925 and was so engaged over the five years prior to the date this Act was passed.

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[6] Red Canyon Sheep Co. v. Ickes, 69 App.D.C. 27, 98 F.2d 308 (1938).

[7] Brooks v. Dewar, *supra* note 4, 313 U.S. at 358.

[8] Hatahley v. United States, 351 U.S. 173, 177 (1956); and see cases cited in notes 5 and 6 *supra*.

[9] Congress specified that no such preference was to be accorded until July 1, 1935 to any person whose rights were acquired between January 1, 1934 and December 31, 1934. "Newcomers" claiming status acquired within the period named thus were precluded from permit preference.

Moreover, section 3 proceeds, grazing permits were to run for a period of ten years, "subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use." The same section recognized that a grazing unit without a grazing permit might suffer loss of value.

We have heretofore noted, as does the statute, that those qualifying under the Act definitely acquired "rights," although we did not define the by category. "Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist *they are something of real value . . . which have their source in an enactment of the Congress.*"[10] Emphasis added.)

We were not alone in recognizing in the *Red Canyon* case that the Act conferred rights upon a permittee who came within its terms. In the Tenth Circuit whose judges are thoroughly familiar with the problems of the range, it has been observed that the Secretary has "not merely a duty to refrain from the invasion of . . . [permittees'] grazing privileges, but an affirmative obligation to adequately safeguard them."[11]

It is reasonable to conclude that the Secretary himself took a similar view of his duty. The Range Code, issued agreeably to the statute, provided specifically that "Preference in the granting of grazing privileges will be given to those applicants within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights . . . owned, occupied, or leased by them."[12] The Range Code

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[10] Red Canyon Sheep Co. v. Ickes, *supra* note 6, 69 App. D.C. at 34, 98 F.2d at 315.

[11] Oman v. United States, 179 F.2d 738, 742 (10 Cir. 1949).

[12] 43 C.F.R. § 161.1(b) (Supp. 1959). Compare § 3 of the Act.

defined "Base property," "Forage land" and "Land dependent by use."[13]

The latter is said to be forage land of "such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 5-year period immediately preceding June 28, 1934 (referred to in this part as 'priority period'), was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years in connection with substantially the same part of the public domain, now part of the Federal range . . . ."[14]

It is clear that a permittee *as against the United States* may acquire no "right, title, interest, or estate in or *to the lands*" (emphasis added) as section 3 provides,[15] and the Government for its own use may without payment of compensation withdraw the permit privilege.[16] Otherwise,

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[13] 43 C.F.R. § 161.2(e), (f) and (g) (1954); classification of base property was provided for in § 161.4.

[14] 43 C.F.R. § 161.2(g) (1954). 43 C.F.R. § 161.2 (k) (1) (Supp. 1959) reads:

"'Land dependent by use' means forage land other than Federal range of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it and which, in the 'priority period', was used as a part of an established, permanent, and continuing livestock operation for any two consecutive years or for any three years of such priority period in connection with substantially the same part of the public domain, now part of the Federal range. The priority period shall be the five-year period immediately preceding June 28, 1934 . . . ."

As to an area placed within a grazing district after June 28, 1938, or added to an existing grazing district thereafter, a different priority period was prescribed.

[15] Compare Osborne v. United States, 145 F.2d 892 (9 Cir. 1944).

[16] United States v. Cox, 190 F.2d 293 (10 Cir.), *cert. denied*, 342 U.S. 867 (1951).

consistently with the purposes and provisions of the Act, "grazing privileges recognized and acknowledged shall be adequately safeguarded."[17] It would seem beyond peradventure that when the Secretary in 1935 created Montana Grazing District No. 1 which included lands upon which this appellant then was grazing, he and others similarly situated "who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range."[18]

What particular *number* of stock a preference applicant might be entitled to graze must depend upon circumstances, having in mind the orderly use of the public lands, the possibility of overgrazing, the forage capacity of the base property, available water and other factors pertinent to such a complicated administrative problem.[19] Subject to such considerations and others specified in the Code, the extent of the appellant's grazing privileges was to be determined.

Thus stood appellant's status as of April 9, 1936, when the Secretary, pursuant to section 2 of the Act, entered into a cooperative agreement by which he licensed the South Phillips Cooperative State Grazing District to ad-

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[17] 43 U.S.C. § 315b (1958); and see Oman v. United States, *supra* note 11, 179 F.2d at 742.

[18] Red Canyon Sheep Co. v. Ickes, 69 App.D.C. at 33, 98 F.2d at 314.

[19] By 1941 the Grazing Service had the responsibility of administering the Act in connection with 142,000,000 acres of federally owned lands, located in 10 Western states, divided into 56 grazing districts. Some 20,000 permits were involved. Testimony of R. H. Rutledge, Director of Grazing Service. *Hearings Before a Subcommittee of the Senate Committee on the Judiciary,* 77th Cong., 1st Sess., pt. 2, at 704 (1941).

minister the Federal range lands in Montana District No. 1. Twenty years later, on June 19, 1956, through his delegated representative, he promulgated a Special Rule[20] for part of Montana District No. 1. He relied upon a special rule-making provision of the Range Code,[21] reciting that he acted upon the recommendation of the Advisory Board of the Malta Grazing District (Montana No. 1) and that a factual showing of necessity had been made by the State Supervisor concurred in by the Area Administrator for the purpose of "classifying and determining the dependency by use of base properties utilizing certain Federal range in Montana Grazing District No. 1. These Federal range lands were formerly administered by Montana Cooperative State Grazing Districts under an agreement with the Bureau of Land Management, and are now bieng administered directly by the Bureau.

Affected particularly were lands involved in this controversy. The Special Rule revised or supplied definitions of terms basic to the administration both of the Act and the Range Code. To illustrate, the Secretary changed the "priority period" from the 5-year period immediately preceding June 28, 1934, to a 5-year period "immediately preceding January 1, 1953";[22] use of the Federal range as part of an established livestock operation was required "during each year of such priority period in connection with such Federal range." Base lands were to be considered as "dependent by use" (Class 1) "only where and to the extent that during each year of such priority period licenses for use of the Federal range in connection therewith were issued under the rules and regulations of the Montana Cooperative State Grazing Districts." Grazing privileges to be granted under the Special Rule were not

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[20] *Supra* note 3.

[21] 43 C.F.R. § 161.16 (Supp. 1959).

[22] Compare note 14 *supra*.

to exceed the lesser of the amounts to be determind pursuant to the amended definitions. We need not details other differences, the particulars of which may be noted by comparison of the referenced provisions. It is enough for our purposes to note that the status of this appellant as a preference applicant was no longer that which had been accorded to him by the Act and the Range Code prior to the Special Rule. Moreover, newcomers to livestock operations in the area during the amended priority period, 1948-1952, were to be given grazing privileges as to base lands "dependent by use" to the extent that they had been licensed during "such priority period" under the administration of the State Cooperatives.[23]

Appellant insists that not only has he not been accorded the rights to which he had become entitled as a matter of law, but that grazing privileges which should rightfully be his have been awarded to others who cannot qualify. He asks us to strike down the Special Rule on the ground, among others, that the rule was issued without notice and hearing. We do not agree with appellant on that proposition.

The Taylor Grazing Act provides for the organization of a Board of Grazing District Advisors. It then provides: "Except in a case where in the judgment of the Secretary an emergency shall exist, the Secretary shall request the

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[23] The Secretary on November 19, 1957, acting by his Solicitor denied administrative relief to this appellant. In his opinion he observed that the South Phillips Cooperative had awarded range privileges "not in accordance with the requirements of the Federal Range Code." The Government in its brief tells us that "The award of privileges for 1953 was an attempt by the Bureau to allow privileges in accord with the Taylor Grazing Act and the Federal Range Code without unduly upsetting recognized range operations." The brief does not explain how permits issued by the cooperative during a period of mismanagement became criteria with respect to the issuance of permits for the year 1953 and succeeding years.

advice of the advisory board in advance of the promulgation of any rules and regulations affecting the district."[24] The Secretary seems to have followed that requirement, as the previously quoted recital from the preamble to the Special Rule discloses. Moreover, the regulations comprising the Range Code were authorized by sections 2 and 3 of the Act. Therein lies the genesis of the authority for the issuance of Special Rules.[25] Again, the notice requirements of section 4 of the Administrative Procedure Act[26] contain an express exception when there is involved rule making relating "to public property, loans, grants, benefits, or contracts." That we are here dealing with matter relating to public property is obvious. Although the Taylor Act in certain other respects provides for public notice and hearing, there is no such requirement as to regulations or rule-making concerning the issuance of grazing permits or a special rule touching problems with respect thereto.[27]

Appellant prays that we order the Secretary to issue a Class One permit for the grazing of 282 animal units and a Class Two permit to graze 157 animal units on the Federal range. We have no such authority.

He has asked that the Special Rule "be vacated, annulled and set aside" as void and of no effect. We decline to do so except as applied to him and in respects we shall mention. The Special Rule otherwise may be entirely proper as to parties not before us, or as to its general applicability respecting situations not shown on this record. We express no opinion on such aspects.

We say this much: this appellant clearly was entitled to "preference" under the Act and the Range Code, as

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[24] 43 U.S.C. § 315o-1 (1958).

[25] 43 C.F.R. § 161.16 (Supp. 1959).

[26] 60 STAT. 238 (1946), 5 U.S.C. § 1003 (1958).

[27] And see Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 257 (1946).

we have shown. The word in the context here used is to be taken in its ordinary sense. Its meaning is plain. It is a term with which Congress is fully familiar as in legislation dealing with immigration,[28] preference in employment,[29] Indian land allotments[30] and many other fields.

So here. "Prefrence *shall be given*" to those like appellant who come within the Act. This appellant not only was engaged in stockraising when the Act was passed, but he qualified under the Range Code as and when first promulgated. He was entitled to rely upon the preference Congress had given him: to use the public range as dedicated to a special purpose in aid of Congressional policy. We deem his rights—whatever their exact nature[31]—to have been "protected against tortious invasion"[32] and to have been "founded on a statute which confers a privilege."[33] Accordingly this appellant was entitled to invest his time, effort and capital and to develop his stockraising business, all subject, of course, to similar preferences to be accorded in the affected area to others comparably situated. We see no basis upon which, by a special rule adopted more than twenty years after appellant had embarked upon his venture, he may lawfully be deprived of his statutory privilege.

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[28] Commr. of Immigration v. Gottlieb, 265 U.S. 310, 314 (1924).

[29] Hilton v. Sullivan, 334 U.S. 323 (1948.

[30] Harnage v. Martin, 242 U.S. 386 (1917).

[31] See Red Canyon Sheep Co. v. Ickes, *supra* note 10; Oman v. United States, *supra* note 11.

[32] Tennessee Power Co. v. T.V.A., 306 U.S. 118, 137 (1939) and Hatahley v. United States, *supra* note 8.

[33] Tennessee Power Co. v. T.V.A., *supra* note 32, 306 U.S. at 137-38; cf. Stark v. Wickard, 321 U.S. 288, 309 (1944) and Burfenning v. Chicago, St. Paul R'y., 163 U.S. 321, 323 (1896).

To the extent that the Special Rule is repugnant to the Act and to the Range Code prior to 1956, if and as applied *to this appellant* to deprive him of his rights and to award others grazing privileges in derogation of appellant's preference status, it is void. We expect that if appellant should again apply for a grazing permit, his application will be processed in a manner not inconsistent with this opinion, but otherwise within the provisions of the Range Code.

The judgment of the District Court dismissing appellant's complaint will be reversed, but our order will not be entered for the time being. Within ten days from the date of this opinion the parties may submit their respective versions of the form they deem the final judgment should take.[34]

Reversed.

MR. JUSTICE BURTON, concurring in part and dissenting in part: Insofar as the opinion of the Court sustains the validity of the special rule, I concur. I would go further and affirm the judgment of the District Court dismissing the complaint.

The authority of the Secretary of the Interior to make rules and regulations consistent with the Taylor Grazing Act is amply established in § § 2 and 3 of the Act. 48 Stat. 1270-1271, 43 U.S.C. § § 315a and 315b. The Federal Range Code promulgated by the Secretary is an exercise of that authority. It expressly provides for the adoption of special rules for grazing districts where local

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[34] The Secretary on brief has noted that if we are constrained to reverse "the only proper procedure would be to remand the matter to the Department of the Interior so that the relative rights of appellant and of all the other users of grazing land in the district could be determined under the procedure of the Range Code, including the Advisory Board's recommendation."

conditions make them necessary "in order better to achieve an administration consistent with the purposes of the act . . . ." 43 CFR, 1959 Cum. Pocket Supp., § 161.16.

The special rule now before us was adopted in complete conformity with the procedure prescribed in the Code. It applies only to specifically described lands, including those in use by appellant, and it changes the basic period, by which it measures the prior use of lands, from the five-year period immediately preceding June 28, 1934 (43 CFR, 1959 Cum. Pocket Supp., § 161.2 (k) (1)), to the five-year period immediately preceding January 1, 1953 (43 CFR, 1959 Cum. Pocket Supp., Note, § 161.2 (k). This procedure provides a way to dispose of the many different kinds of problems the Range Code was established to solve. The rule does not deprive appellant of any vested right, nor is it beyond the scope of the Secretary's rule-making power. It merely provides, in the interest of all concerned, a reasonable regulation of individual rights to the use of public land.

Neither the record nor the majority opinion provides an adequate basis for appellant's claim that the Range Code, by establishing the 1929-1934 priority period, has established in effect a permanent right to use the public range exempt from any modification of those rights even by the rule-making authority by which they were established. The Taylor Grazing Act did not purport to establish a specific and inflexible test as the basis for the preference. Rather, it was a starting point announcing a congressional policy as to the use of the federal range, and delegating authority to the Secretary to make and modify general or specia' rules for carrying out that policy. If the expectations of appellant were thus aroused, they were aroused not by the statute, but by the Range Code's amendable definition of "dependency by use" in terms of a specific priority period.

The present record does not establish the precise amount of appellant's preference under the special rule

and we cannot properly consider the application of the special rule to appellant until he has been assigned a preference under it and grazing privileges are alloted or denied to him by virtue of it. The record does not show that the application to him of the special rule will result in sufficient prejudice to him to qualify him to attack it.[1]

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[1] The findings of the examiner in the administrative hearing, founded on substantial evidence, indicate that, based on the 1929-1934 preference period, McNeil has a Class I preference of 90 animal units, while based on the contested 1948-1952 base period, the testimony in the record indicates he has a Class I preference of more than twice that number of animal units.